IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
LAKE COUNTRY INVESTMENTS LIMITED LIABILITY COMPANY,	)	**Case No. 99-20287**
	)	
	)	**MEMORANDUM OF DECISION**
Debtor.	)	**AND ORDER**
	)	
	)	
	)	

HONORABLE TERRY L. MYERS, U.S. BANKRUPTCY JUDGE

Michael J. Paukert and John E. Miller, PAINE HAMBLEN COFFIN BROOKE & MILLER, Spokane, Washington and Coeur d'Alene, Idaho, for Arrow Point Development Company, Inc.

Bruce A. Anderson, ELSAESSER JARZABEK ANDERSON & MARKS, Sandpoint, Idaho, for West Wood Investments, Inc.

This matter comes before the Court on the request of Arrow Point Development Company, Inc. ("APDC") for an award of attorney's fees and costs it incurred in this chapter 11 case and in certain state court litigation. The award is sought against West Wood Investments, Inc. ("West Wood"), a

creditor and the original petitioner in this involuntary bankruptcy proceeding. The matter having been fully submitted, the Court enters its findings and conclusions on the contested matter as required by Rules 9014 and 7052.

BACKGROUND

West Wood filed an involuntary petition for relief on March 17, 1999, against the Debtor, Lake Country Investments Limited Liability Company ("Debtor"). APDC, as a 50% equity holder of the Debtor and party in interest,[1] raised certain issues regarding the involuntary petition. But the Debtor did not appear and respond as required by the Code and Rules, and an order for relief was duly entered on April 16, 1999.

On April 7, 1999, three weeks after the involuntary petition was filed, West Wood, (acting through attorneys other than those appearing for it in this Court) filed a state court foreclosure suit against the Debtor, APDC, and others. There is no argument taken with the fact that bringing this suit against the Debtor was a violation of the § 362(a) stay, though West Wood claims that only through inadvertence was an earlier drafted complaint not revised and the Debtor left in as a defendant.

[1] APDC is not a creditor, though it is an equity holder. West Wood, a creditor, is not an equity holder, though it is the managing member of Agincourt, LLC, the other 50% equity holder of the Debtor.

On April 9, West Wood dismissed the Debtor from the state court action. This followed the stay violation issue being raised by APDC with West Wood's counsel.

The dismissal after the 2-day pendency of the suit against the Debtor did not resolve the issue. APDC made it clear to West Wood that it believed there was no part of the state court action which should survive given the Debtor's bankruptcy. West Wood, in turn, took the position that the state court action could proceed against parties other than the Debtor (to wit, against APDC), and against the interests of any non-Debtor parties in certain real property, even if the Debtor also had interests in that same property.

Though perhaps overly aggressive and, at least in retrospect, a strategy that almost inevitably would generate continued controversy over the applicability of the § 362 stay, West Wood contends that in no state court pleadings after April 9 did it pursue the Debtor or the Debtor's interests in property. APDC was and remains unconvinced of either the sincerity or effectiveness of West Wood's approach.

On May 20, APDC filed with this Court a "Motion to Enforce Automatic Stay Pursuant to Bankruptcy Court's Civil Contempt Powers" (the "Motion"). The Motion is the source of APDC's fee request. Also in this general time frame, APDC prosecuted a motion to dismiss the state court

litigation. This motion was premised upon the existence of the bankruptcy and upon the absence of Debtor as an indispensable party to the foreclosure action. In fear that the dismissal motion would be deemed by the state court to be a motion for summary judgment, West Wood responded with pleadings including its own motion for partial summary judgment.[2] This simply reinvigorated APDC's contention that the stay was being violated.

As these disputes peaked, West Wood on May 25 elected to drop the state court action altogether. That motion to dismiss was accompanied by a release of the lis pendens which had been filed. West Wood insists its decision was neither motivated by fear of sanction by this Court nor an admission that continuance of its state court action violated the stay.

Following preliminary and final hearings, and submissions of briefing, affidavits and declarations, and copies of state court pleadings, the Motion was taken under advisement.

ARGUMENT

APDC queries: "Should West Wood, who clearly violated the automatic stay, be required to repay the legal fees and costs incurred by APDC as a result of the stay violation?" Memorandum of June 23, 1999, p.1. APDC argues

[2] The fear seems misplaced. APDC's motion to dismiss was premised on I.R.C.P. 12(b)(1) and (7). The conversion of a dismissal motion to a motion for summary judgment upon consideration of extraneous materials occurs only in the case of Rule 12(b)(6) motions, according to the last sentence of I.R.C.P. 12(b).

that *In re Goodman*, 991 F.2d 613 (9th Cir. 1993) provides an equity holder the right to recover for stay violations and that this Court's civil contempt powers under § 105 and Rule 9020 provide the means to enforce that entitlement. APDC contends that it should recover $8,131.50 in fees and $252.52 in costs for its legal efforts allegedly expended in protecting the Debtor and Debtor's property interests from West Wood.[3]

APDC recognizes that § 362(h) is not an available source for the relief sought. That section mandates an award of damages, including fees and costs, for a willful violation of stay, but protects only "individuals" injured and not entities such as either APDC or the Debtor here. *Goodman*, 991 F.2d at 619-20.

APDC notes, correctly, that "ordinary civil contempt" has been judicially recognized as an alternative to § 362(h). *Goodman*, 991 F.2d at 620 (quoting from and adopting the reasoning of *In re Chateaugay Corp.*, 920 F.2d 183, 187 (2d Cir. 1990)). APDC contends that this authority, in conjunction with the Court's powers under § 105, supports award to a non-debtor who

[3] The Court arrives at these figures from the following pleadings: Supplement to Affidavit of John E. Miller asserting $2,462.50 in fees and $ 252.52 in costs; Declaration and Supplemental Declaration of Michael J. Paukert asserting $8,109.00 in total fees but reducing that figure by $2,440.00 (for a legal intern's time) for a balance of $5,669.00.

takes up the shield (and, perhaps, the mace) for a debtor who could not or would not do so.

West Wood disputes not only this legal argument, but also takes issue with the need for APDC to "protect" the Debtor, since West Wood had dismissed -- within two days of its filing -- the state court action against the Debtor. West Wood also urges the Court to view APDC's actions as motivated by self-interest, not a desire to police conduct allegedly in violation of the stay. Finally, West Wood takes issue with the fee claim asserted, alleging that the $8,400 of fees and costs far exceeds what was required in any putative defense of the Debtor's rights.

DISCUSSION

a. Fee shifting

The costs of litigation in bankruptcy are generally borne by litigants, without reimbursement by their adversaries. *Wetzel v. Goldsmith (In re Comstock)*, 16 B.R. 206, 207, 81 I.B.C.R. 114, 115 (Bankr. D. Idaho 1981) (federal courts operate under the "American Rule" which requires parties to bear their own fees and costs absent contract, applicable statute, or certain well-recognized exceptions). *See also, In re LeMaster*, 147 B.R. 52, 53, 92 I.B.C.R. 208, 209 (Bankr. D. Idaho 1992). There is here no applicable contractual right to fees. I do not find that any of the traditionally recognized

exceptions to the American Rule apply. Only in certain discrete circumstances does the Code make fees awardable to litigants from other litigants, and they are inapplicable here.[4]

There has been little doubt since early in this bankruptcy case that, in many if not most ways, this is a two-party dispute. The parties' legal and economic relationships to the Debtor and to one another, and their conduct in this Court and in the state court, validate this proposition. Thus overarching the specific issues presented by the Motion is the question of whether the Court should provide a further catalyst to contentiousness by entering rulings shifting the responsibility for fees as between these two highly litigious adversaries.

Parties' decisions, strategic and otherwise, are subject to and presumptively made with recognition of the principle that litigants in bankruptcy cases are generally responsible for their own legal costs and their opponents generally aren't. The Court is loath to upset this reasoned system, and award fees where the statute is silent or case law less than compelling. I

[4] An example of such a provision is § 523(d). There are other statutory bases for recovering fees in bankruptcy, such as § 330 and 331, but as they don't shift fees between adversaries and because APDC's lawyers aren't estate-retained professionals, they aren't relevant to this discussion. The statutory grant of § 362(h) is specifically discussed, *infra*.

conclude that fee shifting should occur only if the authority is clear and unambiguous.

b. The statutory basis found in § 362(h)

As noted above, there is a fee shifting provision found in § 362(h) which provides and, indeed, mandates award of damages including costs and fees for willful violation of the automatic stay. But this relief is available only for injured "individuals" and *Goodman*, among other cases, acknowledges that the plain language of this statute means what it says. Entities such as APDC (or, for that matter, the Debtor) may not use this section as a predicate for recovery regardless of the seriousness of the alleged conduct or injury. This proposition is not contested by APDC.

c. Contempt powers as an alternative to § 362(h)

1. For non-individual debtors

The Ninth Circuit has embraced the concept that the Court's civil contempt powers may, in appropriate circumstances, provide a basis for sanctioning violation of the stay. *Goodman*, 991 F.2d at 620. APDC erects its arguments and claim to recovery upon *Goodman*. Memorandum of June 23, 1999, at pp. 4-5. In fact, APDC states:

> The Ninth Circuit Court of Appeal in *In re Goodman* made it clear that non-debtor artificial entities may be compensated for damages resulting from a violation of the automatic stay under the court's civil contempt laws. In

> *Goodman*, the Ninth Circuit determined that Johnston Environmental Corporation, a non-debtor, third party, had standing to obtain damages for a violation of the automatic stay. Correspondingly, this bankruptcy court has the inherent authority to sanction West Wood's bad faith conduct.

Memorandum at p.5.

While *Goodman* speaks of the rights of Johnston Environmental, who was not the debtor in the underlying bankruptcy case,[5] the Circuit Court's discussion of the scope of § 362(h), including its references to *In re Atlantic Business and Community Corp.*, 901 F.2d 325 (3d Cir. 1990), *Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289 (4th Cir. 1986), *Chateaugay*, and *In re Mallard Pond Partners*, 113 B.R. 420 (Bankr. W.D.Tenn. 1990), all relate to the rights of corporate debtors and not to corporations generally. 991 F.2d at 619.

When *Goodman* addressed the legislative history of § 362(h), it noted the apparent intent of Congress "to protect natural, or individual, debtors. This category of debtors is 'less likely than corporations to be aware of their rights under the automatic stay.'" 991 F.2d at 620, quoting *Chateaugay*, 920 F.2d at 186 (emphasis supplied.)

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[5] The Debtor (Goodman) was a "sub-sublessee" who acquired his leasehold, which was the property interest allegedly attacked in violation of the stay, from International Packaging Corporation, which was the predecessor in interest to Johnston. 991 F.2d at 615.

When the Court proceeded to adopt *Chateaugay* as authority for the use of civil contempt powers in lieu of § 362(h), it started with the following language from the Second Circuit's decision:

> For other debtors [who are not "individuals"], contempt proceedings are the proper means of compensation and punishment for willful violations of the automatic stay.

Id., quoting *Chateaugay*, 920 F.2d at 186-87. Thus, despite the occasional reference to Johnston, a corporate creditor, essentially all of the analysis of the Court revolved around the rights of corporate debtors as opposed to individual debtors.

Goodman has been characterized, in subsequent Ninth Circuit Court of Appeals decisions, as addressing the rights of the corporate debtor. For example, *Chugach Timber Corp. v. Northern Stevedoring & Handling Corp. (In re Chugach Forest Products, Inc.)*, 23 F.3d 241 (9th Cir. 1994) stated:

> As Chugach recognized in its reply brief, however, we recently held that § 362(h) does not apply to corporations. See *Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 618-20 (9th Cir. 1993).
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> Nevertheless, bankruptcy courts retain discretion to award damages to injured corporate debtors as a sanction for willful violations of the stay. *Id.* At 620.

23 F.2d at 244, n.4 (emphasis supplied.)

Similarly, *United States v. Arkison (In re Cascade Roads, Inc.)*, 34 F.3d 756 (9th Cir. 1994) recognized that damages not available to a corporate debtor under § 362(h) are nevertheless available to such a debtor under § 105(a) as sanction for ordinary civil contempt. 34 F.2d at 766-67, citing *Goodman* and *Chugach*. Both the bankruptcy court and district court had concluded (before *Goodman* was decided) that sanctions were available under § 362(h). The Court of Appeals reversed, stating "[B]ecause Cascade is a corporate debtor, section 362(h) does not authorize the Sanctions Order." 34 F.2d at 766.[6]

The Panel in *In re Colortran, Inc.*, 210 B.R. 823, 828-29 (9th Cir. BAP 1997) similarly recognized *Goodman* as establishing the proposition that corporate debtors may seek discretionary relief under § 105(a) in lieu of § 362(h)'s mandatory relief. In short, *Goodman* has been generally cited as authority for the proposition that corporate debtors have an alternative to § 362(h), and not for the broader proposition (i.e., granting a right to non-debtor entities) which APDC urges.

2. For trustees

[6] Interestingly, the Court in this comment appears to base the lack of entitlement to § 362(h) on the debtor's corporate identity rather than looking to the party seeking the recovery, which in *Cascade Roads* was the trustee. The issue of a trustee's right to sanctions was later addressed in *Pace* and *Del Mission*, discussed in the text, *infra*.

Certain cases diverging from this pattern deal with the rights of a trustee to use § 105(a) and the contempt power. For example, *In re Del Mission Limited*, 98 F.3d 1147 (9th Cir. 1996) held:

> Notwithstanding § 362(h)'s inapplicability, a bankruptcy court may award damages to a trustee for a violation of the automatic stay under its contempt power pursuant to 11 U.S.C. § 105(a). *Pace*, 67 F.3d [187] at 193. Section 105(a) provides that a bankruptcy court "may issue any order ... that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). This provision is broad enough to provide relief to those entitles that are injured by willful violations of the automatic stay, but cannot recover under § 362(h). *Pace*, 67 F.3d at 193; *United States v. Arkison (In re Cascade Rds., Inc.)*, 34 F.3d 756, 767 (9th Cir. 1994). The only meaningful difference between awarding damages under § 362(h), as opposed to § 105(a), is that relief under § 362(h) is mandatory, while relief under § 105(a) is discretionary. *Pace*, 67 F.3d at 193-4.

98 F.3d at 1152-53.

In re Pace, 67 F.3d 187 (9th Cir. 1995), cited in *Del Mission*, established a trustee's right to use the alternative of § 105(a) to recover damages. 67 F.3d at 193. The Court found that, whether a natural person or not, the trustee's status prohibited application of § 362(h), because any damage was not suffered by the trustee as natural person or "individual" but, rather, was suffered by the bankruptcy estate, of which the trustee was merely the representative. *Id.* The

Court found that, in light of *Cascade Roads*, recovery under § 105(a) was available to the trustee.[7]

The Court concludes, however, that a problem exists in reading these cases as supporting a non-debtor, non-trustee's right to recover. *Pace*, *Cascade Roads*, and *Del Mission* all addressed the rights of a trustee who, though not suffering injury as an "individual" and thus excluded from § 362(h), is the representative of the estate. That a trustee should be entitled to seek recourse to the Court's civil contempt powers to protect the estate under his control and authority is not necessarily surprising. Accord, 3 *Collier on Bankruptcy* (15th ed.), ¶ 362.11[3][c], at 362-118.3.[8]

d. Standing

There is yet another line of Ninth Circuit authority which must be considered. *Tilley v. Vucurevich (In re Pecan Groves of Arizona)*, 951 F.2d 242 (9th Cir. 1991) addressed a situation in which a chapter 7 trustee sought to

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[7] *Pace* cites *Cascade Roads* as establishing that "damages not otherwise available to a corporate debtor under section 362(h) ... were nevertheless available under section 105(a) as a sanction for ordinary civil contempt." 67 F.3d at 193. (Emphasis supplied.) The proponent in *Cascade Roads* was in fact the trustee. Thus *Pace's* reliance on *Cascade Roads* is appropriate; its characterization of *Cascade Roads* is not apt.

[8] The authors of the treatise believe the approach taken in *Pace* validating use of the contempt power is preferable to a "tortured reading of the statute in order to provide corporate or partnership debtors or trustees with a remedy for stay violations." *Id.* (Emphasis added.)

avoid a transfer which took place in violation of the automatic stay. Two creditors were allowed to intervene. Judgment was entered for the defendants, and the intervenors appealed, though the trustee did not. The Court affirmed on the basis that the intervening creditors lacked independent standing to contest the stay violation.[9] It stated:

> B&C and Tilley argue that they have standing because they have been injured in their status as creditors of Pecan Groves. B&C and Tilley argue that the purpose of the automatic stay is to protect both the debtor and creditors. See *Stringer v. Huet (In re Stringer)*, 847 F.2d 549, 551 (9th Cir. 1988). B&C and Tilley also argue that is they are not permitted to appeal this order, the lower court will have indirectly given an incentive to creditors to act in violation of the stay, because it is possible that their actions will never be protested by the trustee. B&C and Tilley further argue that allowing creditors to challenge actions violating the stay furthers the policy of the bankruptcy law to preserve the debtor's assets.
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> In previous cases, we have reserved the question of whether a creditor can attack violations of the automatic stay. *James v. Washington Mut. Sav. Bank (In re Brooks)*, 871 F.2d 89, 90 n.1 (9th Cir. 1989); *Magnoni v. Globe Inv. And Loan Co. (In re Globe Inv. And Loan Co.)*, 867 F.2d 556, 559 (9th Cir. 1989). While there is no precedent on point in the Ninth Circuit, the majority of jurisdictions which have considered standing under the automatic stay provision, 11 U.S.C. § 362, have concluded that section 362 is intended solely to benefit the debtor estate. See *In re Globe*, 867 F.2d at 559 & n.6 (citing cases). Language from many cases indicates that, if the trustee does not seek to enforce the protections of the automatic stay, no other party may

[9] "Skousen [the defendant/appellee] argues that B&C and Tilley [intervenors and appellants] do not have standing to attack violations of the stay because they are merely creditors, and not the debtor or the trustee. We agree and affirm the decision of the bankruptcy court." 951 F.2d at 244-45.

> challenge acts purportedly in violation of the automatic stay. *Washington Mut. Sav. Bank v. James (In re Brooks)*, 79 B.R. 479, 481 (Bankr. 9th Cir. 1987), aff'd on other grounds 871 F.2d 89 (9th Cir. 1989); *Bryce v. Stivers (In re Stivers)*, 31 B.R. 735, 735 (Bankr. N.D.Cal. 1983); *Hadsell v. Philadelphia Life Ins. Co. (In re Fuel Oil Supply and Terminaling, Inc.)*, 30 B.R. 360, 362 (Bankr. N.D.Tex. 1983).
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> The trustee is charged with the administration of the estate for the debtor's and creditor's benefit. Allowing unsecured creditors to pursue claims the trustee abandons could subvert the trustee's powers. Granting claimants like Tilley and B&C standing will overburden the bankruptcy courts with litigation. Here, the trustee has not appealed the adverse ruling of the trial court. No other party may challenge this ruling. We therefore hold that a creditor has no independent standing to appeal an adverse decision regarding a violation of the automatic stay.

951 F.2d at 245.

In *Liberty Mutual Ins. Co. v. Official Unsecured Creditors Committee of Spaulding Composites Co. (In re Spaulding Composites Co., Inc.)*, 207 B.R. 899 (9th Cir. BAP 1997), the appellant challenged, under *Pecan Groves'* denial of standing to other than the trustee or debtor, the standing of the appellee creditor committee to prosecute stay violations.

The Panel noted that whether a creditor has direct standing under § 362 was an "interesting question" but one which didn't have to be answered because the objecting party was a creditors' committee, which had filed suit not in its own right but on behalf of the estate. 207 B.R. at 903. The committee was held to have "derivative standing" on behalf of the estate, based

upon the bankruptcy court's retroactive authorization (though the Court noted that it was the better practice to obtain such judicial authorization before suit rather than after the fact.) 207 B.R. at 903-905.[10]

The Panel in *Spaulding Composites* acknowledges, 207 B.R. at 903, n.4, that in chapter 11 cases there are additional standing considerations arising under § 1109(b). More importantly, the Court recognizes an inconsistency between *Goodman* and *Pecan Groves*:

> And finally, the Ninth Circuit itself, in *In re Goodman*, 991 F.2d 613, 620 (9th Cir. 1993), has granted a creditor standing to seek damages for willful violations of the stay pursuant to the bankruptcy court's civil contempt powers, a case that would need to be reconciled to *Pecan Groves* before we could adopt the blanket rule Liberty [the appellee] suggests. See also *Id.* at 618-20 (§ 362(h) creates standing for an "individual" creditor to seek damages for another creditor's willful violation of the stay); *Matter of Vitreous Steel Products*, 911 F.2d [1223] at 1231 [(7th Cir. 1990)] (creditor has standing to seek equitable subordination under § 510(c) for another creditor's violation of stay). We express no view on these matters.

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[10] See also *In re Curry & Sorensen, Inc.*, 57 B.R. 824, 827-29 (9th Cir. BAP 1986) (creditor may act on behalf of estate only upon prior court approval upon trustee's or debtor in possession's refusal to act). Accord, *In re Conley*, 159 B.R. 323, 324-25, 93 I.B.C.R. 241 (Bankr. D.Idaho 1993) (creditors lack standing to assert trustee's avoiding powers, which are for the benefit of the estate, without prior court approval); *Hall v. Sunshine Mining Co. (In re Sunshine Precious Metals, Inc.)*, 157 B.R. 159, 161-63, 93 I.B.C.R. 200, 201-03 (Bankr. D.Idaho 1993) (creditor lacks standing to assert claim against a third party if the injury suffered is general and common to all creditors and derivative of injury to the debtor, and if the trustee or debtor in possession has standing to assert the cause of action.)

Id. (Emphasis added.)[11]

e. Applying the cases

This tour of the case law leads the Court to several conclusions.

APDC is not an "individual" and thus has no recourse to § 362(h) as a basis for its claim against West Wood.

APDC is not a corporate or other non-individual debtor and thus cannot take advantage of the most common articulations of the § 105(a) alternative to § 362(h) in order to recover discretionary, civil contempt sanctions from West Wood.

APDC is not the trustee or the debtor in possession, and cannot fall within the ambit of *Del Mission*, *Pace*, or *Cascade Roads*. And because APDC is neither the trustee or debtor, nor a Court-authorized representative[12] of the estate with derivative standing, *Pecan Groves* and *Spaulding* provide no basis for APDC's assertion of the estate's rights in support of its own recovery.

The injury suffered by APDC which is necessarily asserted here as a predicate for seeking costs and fees for West Wood's stay violation is a general

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[11] Though some between-the-lines' readers might believe that the Panel was actually expressing an opinion while saying it wasn't, it stopped short of granting standing to someone other than a trustee, debtor, or "derivatively" to a Court-authorized representative, for purposes of contesting stay violations.

[12] APDC did not seek, prospectively or retroactively, Court approval to act on behalf of the estate, an approval that *Spaulding Composites*, *Curry & Sorensen*, and *Conley* require.

injury, common to all creditors and derivative of injury to the debtor.[13] *Sunshine Precious Metals* thus also indicates that standing is lacking.

APDC must therefore rely on *Goodman*. The Court sees, in light of the foregoing analysis, three problems with that reliance.

First, *Goodman* at best validates a right of and means for recovery by an injured creditor excluded by virtue of its non-individual status from using § 362(h). Whether *Goodman* protects corporate creditors or, as more commonly read, corporate debtors, it does not announce a similar protection for equity holders. Technically speaking, therefore, APDC does not fall within *Goodman's* protected class.

Second, *Goodman* is inconsistent with *Pecan Groves*. According to *Pecan Groves*, only a debtor or trustee may challenge a violation of stay, and a creditor may not. *Goodman*, at least as read by *Spaulding Composites*, allows a creditor the ability to assert, and recover for, a violation of the stay. How a party can raise an issue and recover upon it without having standing is

[13] APDC could assert, of course, that it had a direct injury caused by West Wood's litigation in state court. But while this might provide standing, it eliminates the underpinning for the instant claim to costs and fees, which is premised on the theory that the Debtor's rights under the stay had been violated by West Wood.

unexplained in *Goodman*, a decision issued two years after *Pecan Groves*. Later cases have not explained away this problem.[14]

Third, even if *Goodman* is as broad as APDC submits, and ignoring all the other issues discussed above, it is nonetheless clear that relief under the § 105(a) civil contempt alternative to § 362(h) is discretionary, not mandatory. I am not persuaded that the Court should exercise its discretion to grant an award of fees from West Wood to APDC in this case. Several factors come to bear.

There was no proven damage to the Debtor or the Debtor's estate from the short-lived foreclosure suit. The question is solely one of APDC's fees.

The contested conduct involved more than just a violation of the Debtor's rights, given West Wood's pursuit of APDC as a co-defendant. In the state court action, APDC was protecting or promoting its own interests, as well as allegedly acting for or on behalf of the Debtor.

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[14] *Spaulding Composites*, at 207 B.R. 903, n.4 quoted above, says *Goodman* and *Pecan Groves* would have to be reconciled. There appears to be precious little room for reconciliation. It is in large part due to this conflict in the case law that the Court has gone to some length to consider the foundations of, and limits upon, *Goodman*. The Court further finds interesting the analysis of these issues, including the Ninth Circuit cases, found in *Matter of Ring*, 178 B.R. 570 (Bankr. S.D.Ga. 1995) which included discussion of one of at least two "unpublished" but computer- accessible Ninth Circuit dispositions following and applying *Pecan Groves*.

This is primarily a two-party dispute, between a 50% equity holder of the Debtor and a creditor which just so happens to be the managing member of the other 50% equity holder. This dispute over the reach of the stay and West Wood's violation(s) was but one aspect of litigation between them in this Court and in other forums.

The totality of the circumstances in this case and the various considerations discussed above lead the Court to conclude that shifting the fees in the fashion sought by APDC should not be approved.

f. Equitable extension of the cases

APDC relies in part upon the Court's equitable §105(a) powers in support of its claim, and presumably would seek application of those powers to ameliorate any real or perceived problems in applying *Goodman*. The Court declines to so use § 105(a). The Ninth Circuit has stated:

> Our interpretation of section 105(a) begins, of course, with its language. *Community for Creative Non-Violence v. Reid,* ___ U.S. ___, 109 S.Ct. 2166, 2172, 104 L.Ed.2d 811 (1989). Section 105 limits the court to ordering those injunctions "necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). While endowing the court with general equitable powers, section 105 does not authorize relief inconsistent with more specific law. *In re Golden Plan of California, Inc.*, 829 F.2d 705, 713 (9th Cir. 1986) (Golden Plan) ("a bankruptcy court's equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act."); *Johnston v. First National Bank of Montevideo, Minnesota,* 719 F.2d 270, 273 (8th Cir. 1983) ("Although

> a bankruptcy court is essentially a court of equity, its broad equitable powers may only be exercised in a manner which is consistent with the provisions of the Code.") (citations omitted), cert. denied, 465 U.S. 1012, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984).

American Hardwoods, Inc. v. Deutsche Credit Corporation (In re American Hardwoods, Inc.), 885 F.2d 621, 625 (9th Cir. 1989).[15] See also, *In re Gurney*, 192 B.R. 529, 537 (9th Cir. BAP 1996); *TKO Properties LLC v. Young (In re Young)*, 97.4 I.B.C.R. 123, 127 (Bankr. D.Idaho 1997).

g. Conclusion

Here APDC is not the debtor and not the trustee, and has not been authorized to act for either. Even if it acted in good faith when it elected to volunteer its services to the defense of the Debtor's interests, it has provided no clear authority that those services are compensable rather than gratuitous.

Absent prior approval, interested parties (whether creditors or equity holders) aren't allowed to play the role of the Debtor's ombudsman, or to recover costs and fees expended in doing so.

While the Court appreciates that § 1109(b) gives a party in interest, including an equity holder such as APDC, the right to "appear and be heard on any issue," and this would certainly include bringing a potential or actual stay

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[15] Coincidentally, the above passage in *American Hardwoods* continues: "For example, section 105 does not empower the court to award attorney fees absent specific statutory authority...." *Id.*

violation to the attention of the Court, this does not automatically or necessarily confer a right to compensation.

Even construing the authorities most favorably to APDC's position, it's clear that recovery of costs and fees is not mandatory but, rather, is discretionary. Under the facts of this case (including the specific nature, degree and duration of the stay violation involved, the damage suffered by the estate, and the posture of the parties and the litigation), the Court concludes that its discretion should be cautiously exercised. The Court will not so read -- or expand -- the precedent, nor so liberally construe § 105(a), so as to authorize recovery of sanctions by this equity holder from West Wood. Nor will the Court initiate a process of fee shifting between these two adversaries, a process generally verboten, based on the incidental benefit to the estate from APDC's ongoing litigation with West Wood.

APDC's Motion will, upon the foregoing analysis and for the reasons stated, be denied.[16]

An aside: Other fee recovery provisions

[16] Certain issues under the Motion which are mooted by this conclusion. For example, there are limits on just how civil contempt matters are to be handled by bankruptcy courts. See, *Cascade Roads*, 34 F.3d at 767 (discussing *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd., Inc.)*, 827 F.2d 1281 (9th Cir. 1987)). See also, *In re Ramirez*, 183 B.R. 583, 589, n.5 (9th Cir. BAP 1995).

Despite the Court's conclusions on the Motion, is there yet a vehicle available to transport APDC to its desired destination?

If APDC's goal is reimbursement of costs and fees, without regard to the source of payment (i.e., without necessarily being paid directly by West Wood), there may be such a vehicle. Certain of the services rendered by APDC are arguably compensable (though from the estate, not West Wood) under the authority of § 503(b)(3) and (4).[17]

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[17] (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including --

...

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by --

...

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

...

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

Id. (Emphasis added).

The Court on this present record would observe that some amount of fees and costs reflects a potentially allowable administrative expense under this conceptual framework. The equity holder achieved a dismissal of the Debtor from the state court action, remedying a clear violation of stay (though one with no cognizable damage other than the relatively minimal fees required in contacting West Wood's counsel and convincing them to dismiss the Debtor, a process which took only 2 days and accounted for but a small portion of the fees claimed). The efforts of APDC were also no doubt at least in part a reason why West Wood elected to dismiss the entire suit -- a suit which at a minimum could have been disruptive of the bankruptcy process, given the interrelationships of these parties and the arguments over the impact of the state court litigation on their relative property interests.

Nevertheless, a trustee has now been appointed, and is entitled to be heard on all requests for allowance of administrative expense. And the U.S. Trustee and all other creditors and parties in interest are entitled to notice and opportunity to be heard on all requests for such an allowance. Though one might wonder if any of these parties are likely to raise opposition to the magnitude that West Wood already has, they are entitled to the chance. The Court cannot sua sponte convert the Motion into a request for allowance for administrative expense treatment, and then summarily grant the same.

ORDER

Based upon the foregoing, the Motion is DENIED, without prejudice, however, to any subsequent application under § 503(b)(3) and/or (4).

Dated this 22nd day of September, 1999.